

be reserved for noncommercial educational entities. Broadening the class of eligible users for the already limited Section 25(b) capacity decreases the probability that the capacity will be available for the use Congress intends -- the delivery of noncommercial educational or informational program services.

DirecTv's argument is also in direct conflict with Congress' clear intent to create a "reserve" for noncommercial program services. DirecTv is in essence arguing that DBS providers are free to determine how to satisfy the obligations of Section 25(b), as long as a portion of the capacity mandated by the section is made available to "national educational programming suppliers." That interpretation makes Section 25(b) little more than an obligation to serve the public interest in a specific manner -- by making noncommercial educational or informational programming available. As such, it reduces the requirements of Section 25(b) to a subset of the obligations imposed by Section 25(a), rather than an independent and distinct requirement.

That interpretation is inconsistent with the Act, which clearly establishes that Section 25(a) and Section 25(b) impose separate and distinct obligations. Section 25(a) states that the "Commission shall . . . [adopt rules] to impose on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. . . .," while Section 25(b)(1) directs the Commission to require a DBS provider to "reserve a portion of its channel capacity . . . exclusively for noncommercial educational or informational programming."

Thus, it is clear that the obligations of the two sections are severable and distinct. Further, Congress gave the Commission different instructions as to how to implement the two sections: Section 25(a) affords the Commission broad discretion to define the public interest obligations of DBS providers, while Section 25(b) provides that:

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal [sic] for a provider of direct broadcast satellite service . . . that the providers of such service reserve a portion of its channel capacity . . . (emphasis added)

B. Limiting Eligibility to Use the Reserve to National Educational Programming Suppliers Will Permit the Commission to Avoid Defining Eligible Programming

In its initial Comments, APTS argued that the Commission need not define the term "noncommercial educational or informational programming" as long as those eligible to use the Section 25(b) capacity were limited to "national educational programming suppliers" as defined in Section 25(b)(5)(B). Under Section 25(b)(5)(B), "the term 'national educational programming supplier' includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."¹⁶

These entities are, by their nature noncommercial educational organizations, and should assure that the programming

¹⁶ The Commission should not interpret the word "includes" in the definition as permitting a more expansive list of eligible suppliers. Congress specifically identified the classes of eligible providers in the definition. If it intended the categories to be broader than those listed it would have made it clear that the categories of providers listed were illustrative rather than inclusive.

distributed by means of the set aside fulfills Congress' goals. The first two entities -- a noncommercial educational television station and a public telecommunications entity -- are by definition non-profit organizations engaged in the business of disseminating noncommercial educational program services.¹⁷ The final category -- public or private educational institutions -- are manifestly educational and should also be non-profit.¹⁸ Defined as such, these categories are expansive enough to include a broad class of eligible entities, yet narrow enough to ensure that the set aside will be used, as Congress intended, exclusively for noncommercial program services.

However, if the Commission decides that entities other than "national educational programming suppliers," as defined in Section 25(b)(5)(B), are eligible to use Section 25(b) capacity, then it must define "noncommercial educational or informational programming" in order to assure that the reserved capacity is used for its intended purposes. And, the Commission must define the term narrowly, lest the reserved capacity be used for programming of dubious educational or informational value. Cf.

¹⁷ See 47 U.S.C. § 397(6), (7), (12) and (14).

¹⁸ In order to avoid questions as to the educational nature of this category, APTS maintained in its initial Comments that the class should be limited to accredited educational and governmental institutions. See APTS Comments at 21-23, 25-26.

Policies and Rules Concerning Children's Television Programming,
8 FCC Rcd 1841 (1993).¹⁹

As APTS also noted in its initial Comments, developing a definition of those terms that is meaningful and enforceable will be difficult. In addition, the effort entails substantial First Amendment issues -- issues which the Commission has wisely avoided in other contexts. Given these difficulties, APTS vigorously urges the Commission to reject DirecTv's proposal and to restrict those eligible to use of the reserved capacity to "national educational programming suppliers" as defined in the Act.

**C. The Difficult Issues Raised by Commenters
Point to the Need for an Advisory Committee**

As APTS noted in its initial Comments and as the other Comments filed in this proceeding demonstrate, Section 25(b) raises a number of difficult issues. APTS Comments at 30-32. For example, HITN proposes limits on the amount of channel capacity each noncommercial program supplier should be allowed to use. HITN Comments at 20. The CFA advocates that capacity

¹⁹ DirecTv urges that Commission to define the eligible programming in terms of the definition set forth in the House and Senate Reports. APTS submits that that definition is inadequate and will not assure that the Section 25(b) capacity is used as Congress intended. That definition was advanced in the context of a proposal in which a selected noncommercial educational entity would control the use of the reserved capacity. Thus, the assurance that the capacity would be used for its intended purpose was provided by the noncommercial, nonprofit nature of the programmer. The Act no longer provides for such a noncommercial arbiter and the definitions themselves will not preclude the misuse of the reserve for programs of questionable educational or informational value.

should be made available on a first-come, first-served basis. CFA Comments at 9. CFA also alludes to questions as to how this programming will be funded, a matter of concern which APTS also addressed in its initial Comments. Other commenters have raised other questions concerning the manner in which this capacity will be deployed which can materially affect the benefits achieved by the set aside.

These issues point to the need for the Advisory Committee advocated by APTS in its initial Comments. APTS Comments at 30-32. As more DBS satellites are launched and the educational potential of DBS distribution is understood by noncommercial entities, demands for time by noncommercial entities will increase. Some formal mechanism must be in place to resolve these conflicting demands for noncommercial capacity if the public is to realize the benefits of Section 25(b). APTS believes that the best way to address these issues is for the Commission to create an Advisory Committee to study them and to make recommendations to the Commission, and perhaps Congress, on how best to secure the substantial benefits achievable through a coordinated and comprehensive plan to implement Section 25(b).

Pending resolution of the allocation issues by an advisory committee, APTS agrees with several of the commenting parties that the capacity is most likely to be used in a productive and meaningful manner if the DBS provider has the discretion to choose the noncommercial entity to which the reserved capacity

should be made available.²⁰ However, if DBS providers are given this discretion, the Commission must limit the eligible entities to those listed in Section 25(b)(5)(B) and prohibit any ownership relationship between DBS providers and noncommercial program suppliers.²¹ Such a prohibition will prevent abuse by DBS providers as well as preclude them from giving preferential treatment to noncommercial entities with which they are affiliated, even though other noncommercial program suppliers offer higher quality and more diverse programming. Additionally,

V. The Commission Should Define Direct Costs Narrowly To Facilitate the Use of the DBS Capacity by Educational Users

In its Comments, APTS argued that since the purpose of Section 25(b) is to facilitate the use of DBS capacity by noncommercial educational users, direct costs should be defined narrowly. In particular, the Commission should be guided by the Congressional mandate that the costs must be directly related to making the DBS channel available to the noncommercial user. See H. Rep. No. 102-628, 102d Cong., 2d Sess. 124-25 (1992). In accordance with that mandate, APTS submits that direct costs should be defined to equal avoidable costs. Thus, costs that would be incurred regardless of whether a noncommercial program

development of noncommercial educational and informational programming.

Respectfully submitted,



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July 14, 1993

APPENDIX A

Statement of Michael S. Alpert

STATEMENT OF MICHAEL S. ALPERT

I, Michael S. Alpert, under pains and penalty of perjury, hereby make the following statement:

I have been employed in the telecommunications industry for the past 19 years -- 12 years in senior management positions with COMSAT and the past 7 years as a consultant for both large as well as small entrepreneurial companies. At COMSAT, I was Vice President of Corporate Development and, in that capacity, established the basic direct broadcast satellite ("DBS") business concept and managed COMSAT's DBS project team. After COMSAT received the first DBS license from the Federal Communications Commission ("FCC"), I served as Executive Vice President of Satellite Television Corporation, COMSAT's DBS subsidiary, and was responsible for all aspects of DBS operations, including marketing, programming, field operations, broadcast engineering and operations, and management information systems.

After COMSAT withdrew from the DBS business, I remained professionally involved in the emerging DBS business. I have written articles for domestic and international publications and spoken at industry forums, including the National Association of Broadcasters' Group Executive Broadcasting Forum, on the topic of DBS. In my consulting practice, I advise a variety of companies which are exploring the opportunities inherent in the DBS business. As a result of my strong interest in DBS and the requirements of my consulting practice, I have kept apprised of all aspects of the DBS business.

Comments Relating to the Proposed Delay of Noncommercial
Obligations of DBS Providers

In MM Docket No. 93-25, several parties have suggested that the Commission postpone the obligation to reserve noncommercial capacity until some time after DBS operations begin. That argument

etc. Thus, the two licensees with 27 frequencies each will be able to offer over 100 channels, the licensees or prospective licensees with 11 frequencies each will be able to offer a minimum of 44 program services, and USSB will be able to offer at least 20.

Since most DBS providers plan to offer subscription and pay-per-view movie services, which can be compressed on a 10:1 basis, the average number of program services per DBS transponder will be greater than 4:1 and more likely will be in the 6:1 to 8:1 range. At a 6:1 ratio, those licensees with 27, 11, and 5 frequencies would be able to offer 162, 66 and 30 channels of programming, respectively. Based upon the Association of America's Public Television Stations' ("APTS") recommendation that noncommercial programmers be entitled to 4% of the capacity of DBS operators with 5 transponders, and that noncommercial programmers should be given 7% of the capacity of DBS operators with over 8 transponders, and assuming a 6:1 compression ratio, DBS operators with 27, 11 and 5 frequencies would still be able to offer 151, 61 and 29 commercial program services, respectively.

In comparison with cable, even the licensees with 11 frequencies will have the capacity to provide more commercial program services than today's average cable system. In addition, the DBS operator does not have the "must carry" obligations of cable systems and thus, they will actually have more flexibility in providing a package of attractive commercial programs on a combination of an a la carte, subscription or pay-per-view basis, even after reserving space for noncommercial services.

Finally, Primestar Partners' proposal to allow Part 25 satellites with fewer than 100 channels to meet only the 4% capacity level does not seem to be based on a sound business foundation. Assuming the minimum compression ratio of 4:1, 100 channels represent 25 transponders or more than double the 11 frequencies that the FCC will be granting to most of the remaining DBS applicants and almost the same number as granted to DirecTv. At 6:1, it represents approximately 16 transponders or the equivalent of one high power DBS satellite. Thus, Primestar Partners' proposal is unnecessarily restrictive and DBS operators using medium powered Part 25 satellites can easily devote at least 4% of their capacity to noncommercial educational programmers without impairing the efficacy of their program service.

Comments Relating to the Use of 4:1 Compression as a Standard

DirecTv's proposal to use a fixed compression ratio of 4:1 in determining the capacity for noncommercial programming should be rejected because it does not take into account technological trends and advances. As noted above, the existing state of the art will allow for a minimum of 4:1 compression for all services, except for HDTV. Movie channels will use a compression ratio that will allow the showing of 10-12 films on 1 transponder. New technology is already being proposed that will compress a greater number of channels within a satellite transponder. Therefore, the use of a fixed ratio would be inappropriate. If one were to be used, however, it clearly should be higher than the existing 4:1 minimum.

APTS has proposed a formula which takes into account the dynamic nature of technology and one that is easy to use. Using this type of approach makes business sense in that it reflects the way in which the DBS operator actually provides program services and is not tied to existing technology, which will provide even greater capacity over the next few years.


Michael S. Alpert

July __, 1993

CERTIFICATE OF SERVICE

I, Cynthia T. Miller, hereby certify that on this 14th day of July, 1993, copies of the foregoing REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS were served by U.S. mail, first class, postage prepaid upon the following parties:

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